

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA,) Case No. CR 08-00513 RMT
Plaintiff,) ORDER GRANTING
vs.) DEFENDANT'S MOTION TO
GUSTAVO MENDOZA - PULIDO,) SUPPRESS EVIDENCE
Defendant.)

)

This matter has come before the court on the motion by Defendant Gustavo Mendoza - Pulido ("Defendant") to suppress evidence. A hearing on Defendant's motion was held on September 29, 2008, at which time this court orally granted the motion. The court issues this written order to ensure the record reflects the basis on which Defendant's motion to suppress evidence was granted.

On April 12, 2008, Defendant Gustavo Mendoza - Pulido was charged with knowingly and intentionally possessing with the intent to distribute, one kilogram or more of a mixture or substance containing a detectable amount of heroin, in violation of 21 U.S.C. §§ 841 (a) (1) and (b) (1) (A). On August 20, 2008, Defendant filed a motion to suppress all evidence obtained when federal agents stopped the vehicle driven by Mr. Mendoza - Pulido on April 12, 2008. Defendant's Motion to Suppress Evidence ("Def's Mot.") at 6. According to Defendant, the evidence should be suppressed because the

1 federal agents lacked reasonable suspicion to stop Mr. Mendoza - Pulido's vehicle, thus
2 violating Defendant's Fourth Amendment rights. *Id.* at 8.

3 On September 29, 2008, the court conducted an evidentiary hearing on
4 Defendant's Motion. Border Patrol Agent Miguel Perez ("Agent Perez"), with the
5 United States Customs and Border Protection ("USCBP") and Senior Border Patrol
6 Agent Luis Lopez ("Agent Lopez"), also with USCBP, testified during the evidentiary
7 hearing.

8 The court, having considered the pleadings, record, testimony during the
9 evidentiary hearing, and other papers filed in this matter, finds as follows:

10 On Saturday, April 12, 2008, at approximately 9:30 a.m., Agent Perez noticed
11 Defendant's blue Ford Expedition while patrolling Interstate 15 ("I-15") in the
12 northbound direction. Declaration of Agent Perez ("Perez Decl.") ¶¶ 4, 6, attached to
13 Gov't Opp'n. At the time, Agent Perez was driving an unmarked Chevrolet Camaro.
14 *Id.* ¶ 4. Agent Perez testified that as Defendant passed by him, driving approximately
15 75 miles per hour, he noticed that Defendant was driving alone, seemed calm and
16 relaxed and that Defendant's vehicle had Baja California, Mexico, license plates. In his
17 declaration, Agent Perez remarked that as Defendant passed by him, Defendant did not
18 look at Agent Perez. Perez Decl. at ¶ 10.

19 According to Agent Perez, when Defendant noticed the marked Border Patrol car
20 driven by Agent Lopez on the road ahead, Defendant slowed down his vehicle and
21 changed lanes, from the second lane from the left, to the third lane, thus increasing the
22 distance between the Defendant and Agent Lopez' car, then on the first and fastest lane.

23 Agent Perez testified that when Defendant changed lanes, Defendant looked
24 "shocked" in reaction to seeing Agent Lopez' marked vehicle. Asked about his location
25 in relation to the Defendant, Agent Perez first testified that he was driving on the fourth
26 and slowest lane and about thirty-two to forty-eight feet away from Defendant's vehicle,
27 and that he could see Defendant's eyes and facial expressions through the Ford

1 Expeditions' rear window and through Agent Perez' front windshield.¹ After defense
 2 counsel showed Agent Perez photos of Defendant's Expedition, which showed that both
 3 the rear window as well as the side rear window were tinted, Defendant's Exhibit C and
 4 D, Agent Perez vacillated in his testimony.² Agent Perez first said he could see
 5 Defendant's "shocked" expression through the tinted windows, and then, that he had
 6 seen Defendant's facial expressions through the side window because, at one time,
 7 Defendant and Agent Perez were driving side by side. Upon further questioning, Agent
 8 Perez acknowledged that at no point before had Agent Perez mentioned he had driven
 9 side by side with the Defendant.

10 Agent Perez then radioed Agent Lopez to tell him that Defendant had slowed
 11 down and changed lanes as Defendant approached Agent Lopez' marked vehicle.

12 According to Agent Lopez, upon receiving Agent Perez' call, he noticed that
 13 Defendant's car was two lanes to his right and approaching Agent Lopez, whose vehicle
 14 was then in the fast, Number 1 lane and going about 70 to 75 miles per hour. Agent
 15 Lopez testified that he then slowed down his own vehicle to about 40 to 45 miles per
 16 hour, still in the fast lane, until Agent Lopez was driving beside Defendant. Agent
 17 Lopez testified that as they drove side by side for approximately ten seconds, Agent
 18 Lopez was able to intensely observe Defendant through Defendant's driver's side
 19 window. Agent Lopez testified that while driving side by side, he noticed that
 20 Defendant looked so tense and was grabbing the steering wheel so tightly with both
 21 hands, that, to Agent Lopez, it seemed Defendant's body was being pushed back into
 22 the seat. According to Agent Lopez, Defendant never looked at Agent Lopez as

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24 ¹ In his declaration, Agent Perez stated, in pertinent part, that "[a]s [Defendant] changed lanes,
 25 defendant looked back and to the side, over both shoulders. He looked shocked. His eyes were
 26 opened wide. I was able to see this because I was still in the Number 4 Lane, not far behind him."
 27 Perez Decl. at ¶ 13.

28 ² The photographs were later admitted into evidence.

1 Defendant drove past him.

2 Agent Lopez testified that after Defendant drove past him, Agent Lopez changed
 3 from the first and fastest lane to the third lane, behind Defendant's vehicle. As Agent
 4 Lopez remained behind Defendant's vehicle, Defendant changed to the second lane,
 5 increasing his vehicle's speed. According to Agent Lopez, because he interpreted
 6 Defendant's move as an attempt to escape, Agent Lopez activated his lights and stopped
 7 Defendant.

8 Defendant seeks to exclude all evidence obtained from Defendant's stop on April
 9 12, 2008. Def's Mot. at 1-2. Defendant argues that because the federal agents had no
 10 reasonable suspicion to stop him, the stop was illegal, making all evidence obtained as a
 11 result of the stop inadmissible at trial as a result of a violation of Defendant's Fourth
 12 Amendment rights. Def's Mot. at 8.

13 A law enforcement officer's investigatory stop of a vehicle implicates a
 14 defendant's Forth Amendment rights "because stopping an automobile and detaining its
 15 occupants constitute a seizure ... even though the purpose of the stop is limited and the
 16 resulting detention quite brief." *United States v. Choudhry*, 461 F.3d 1097, 1100 (9th
 17 Cir. 2006) (citing *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)). Courts have found
 18 that because investigatory traffic stops are akin to the on-the-street encounters addressed
 19 in *Terry v. Ohio*, 392 U.S. 1 (1968), the same objective standard as in *Terry* applies to
 20 investigatory traffic stops. *Choudhry*, 461 F.3d at 1100 (citing *United States v.*
 21 *Lopez-Soto*, 205 F.3d 1101, 1104 -1105 (9th Cir. 2000) ("We join those circuits and
 22 reaffirm that the Fourth Amendment requires only reasonable suspicion in the context of
 23 investigative traffic stops.")) Thus, a law enforcement officer may conduct an
 24 investigatory traffic stop if the officer has reasonable suspicion "that a particular person
 25 has committed, is committing, or is about to commit a crime." *Lopez-Soto*, 205 F.3d
 26 at 1104 (citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)).

27 Reasonable suspicion exists when "an officer is aware of specific, articulable
 28 facts which, when considered with objective and reasonable inferences, form a basis for

1 *particularized suspicion.*" *United States v. Montero-Camargo*, 208 F.3d 1122, 1129
 2 (9th Cir.2000) (en banc). Particularized suspicion encompasses two elements. "First,
 3 the assessment must be based upon the totality of the circumstances. Second, that
 4 assessment must arouse a reasonable suspicion that *the particular person being stopped*
 5 *has committed or is about to commit a crime.*" *Id.* (emphasis in original).

6 Although the reasonable suspicion standard "allows officers to draw on their own
 7 experience and specialized training to make inferences from and deductions about the
 8 cumulative information available to them," *United States v. Arvizu*, 534 U.S. 266
 9 (2002), "experience may not be used to give the officers unbridled discretion in making
 10 a stop." *United States v. Manzo-Jurado*, 457 F.3d 928, 935 (9th Cir. 2006).

11 Accordingly, to establish reasonable suspicion, an officer cannot rely solely on
 12 generalizations that, if accepted, would cast suspicion on large segments of the
 13 law abiding population. Seemingly innocuous behavior does not justify an
 14 investigatory stop unless it is combined with other circumstances that tend
 15 cumulatively to indicate criminal activity.

16 *Id.* (internal citations omitted.)

17 In Defendant's case, the Government argues the officers had reasonable suspicion
 18 to stop Defendant because, based on their experience as USCBP agents, they found that
 19 a person, driving a Ford Expedition, alone, on a highway known as a route heavily used
 20 to smuggle drugs and illegal aliens, at a time of the day close to USCBP's shift change,
 21 near the closed Temecula Checkpoint - about 70 to 75 miles from the border between
 22 the United States and Mexico - in combination with Defendant's change in behavior,
 23 was suspicious. Gov't Opp'n at 19-20.

24 The court finds that the Agents' attempts to characterize Defendant's behavior as
 25 suspicious are not credible. The inference the Agents drew from Defendant's innocuous
 26 behavior, in combination with the other circumstances surrounding Defendant's stop, do
 27 not support the Agents' testimony that they had reasonable suspicion that Defendant had
 28 committed or was about to commit a crime.

1 Agent Perez testified that he thought it was suspicious that Defendant, seeing a
2 marked law enforcement vehicle ahead, decreased his vehicle's speed from 70-75 miles
3 per hour to 60 to 65 miles per hour, a speed closer to the legal speed limit. According
4 to Agent Perez, this behavior was suspicious because local drivers know USCBP agents
5 "have no authority to issue traffic citations." Perez Decl. ¶11. Both Agent Perez and
6 Agent Lopez testified they noted that Defendant did not look at either of them as
7 Defendant passed by them. According to Agent Lopez, this behavior was suspicious
8 because locals not only do not slow down when they see a marked USCBP vehicle in
9 the vicinity of the I-15 Corridor, they "commonly go around" the USCBP vehicle, and
10 "regularly acknowledge [the USCBP Agent] as they drive by, often by looking [their]
11 way." Lopez Decl. ¶7. It is odd that the Agents were suspicious of Defendant for not
12 behaving as "a local" when the Agents themselves found it notable that Defendant's car
13 had Baja California, Mexico, license plates. The most reasonable conclusion from
14 Defendant's behavior, given the knowledge the Agents impute to locals, was that, in
15 fact, Defendant was not a local. Under the Agents' characterizations, all non-locals
16 traveling through an international route known for drug smuggling who do not behave
17 as locals do would be suspicious.

18 Furthermore, it is certainly reasonable for a driver traveling faster than the legal
19 speed limit to reduce his speed upon spotting a marked law enforcement vehicle for no
20 other reason than to bring his vehicle's speed to within the legal speed limit. Both
21 Agents rely "solely on generalizations that, if accepted, would cast suspicion on large
22 segments of the law abiding population." *Manzo-Jurado*, 457 F.3d at 935.

23 The Government points to additional circumstances, arguing that, combined with
24 Defendant's slowing down at the sight of a marked law enforcement vehicle and not
25 acknowledging the law enforcement agent as he drove by, cumulatively tend to indicate
26 criminal activity. The additional circumstances upon which the Government relies,
27 however, are also not convincing.

28 Agent Lopez testified that Defendant's nervousness when Agent Lopez was

1 driving side by side with Defendant was suspicious. However, during his testimony,
2 Agent Lopez agreed that he, himself, would have become nervous had he seen a marked
3 law enforcement vehicle abruptly reduce his speed, from 70 or 75 miles per hour to 40
4 or 45 miles per hour while still in the fast lane on an interstate highway, and had the
5 officer in that marked law enforcement vehicle stared at him for ten seconds.

6 Although the Agents testified that Defendant, driving by himself on a Saturday
7 morning, was suspicious because vehicles on the road on a Saturday morning usually
8 transport families, they also testified that a person driving a large vehicle with a group
9 of people may be suspected of smuggling aliens.

10 According to the Agents, one of the main factors they rely upon when
11 determining reasonable suspicion to stop an individual is the individual's changes in
12 behavior. Thus, the Agents point to the change in Defendant's facial expressions when
13 Defendant noticed the marked vehicle. The court finds that the Agents' observations of
14 Defendant's demeanor are not credible. While Agent Perez testified he was able to see
15 Defendant's facial expression from a distance while the Agent himself was in his
16 vehicle, Agent Perez described his vantage point very differently when confronted with
17 photos of the vehicle showing the back windows were tinted. When the reasonable
18 suspicion of the stop depends on law enforcement observations of a defendant's
19 demeanor, an officer's ability to indeed observe the demeanor in question is crucial.

20 Finally, while the Agents try to characterize Defendant's changing lanes and
21 increasing his speed as evasive maneuvers, changing lanes and moving away from a law
22 enforcement vehicle fall far short of the evasive behavior that has supported reasonable
23 suspicion in other cases. *Montero-Camargo*, 208 F.3d at (drivers making U-turns when
24 approaching checkpoint a significant factor in finding reasonable suspicion); *United*
25 *State v. Rodriguez-Sanchez*, 23 F.3d 1488, 1493 (9th Cir. 1994) (sudden and abrupt exit
26 from highway onto an exit ramp obvious attempt to evade officers that can support
27 reasonable suspicion) *overruled on other grounds* by *Montero-Camargo*, 208 F.3d at
28 1134 n.22. Moreover, without more, changing to a faster lane and increasing a vehicle's

1 speed once in the faster lane cannot be construed as an evasive maneuver.

2 Thus, the court finds there was no reasonable suspicion to justify stopping
3 Defendant's vehicle.

4 Accordingly,

5 IT IS ORDERED that Defendant's Motion to suppress is HEREBY GRANTED,
6 thus all evidence obtained as a result of the investigatory stop of Defendant's vehicle on
7 April 12, 2008 is SUPPRESSED.

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9 Dated: October 9, 2008.


10 ROBERT M. TAKASUGI
11 United States District Sr. Judge

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